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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,

Appellant,

against

CITY OF JERSEY CITY, and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

MOTION IN THE ALTERNATIVE BY APPELLANT TO CORRECT DIMINUTION OF RECORD

JOHN F. FINERTY
Counsel for Appellant
Hudson & Manhattan Railroad Company

JOHN E. BUCK,
THOMAS A. HALLERAN,
CRAVATH, SWAINE & MOORE,
Of Counsel.

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To the Honorable the Supreme Court of the United States:

HUDSON & MANHATTAN RAILROAD COMPANY, appellant in the above proceedings, respectfully moves the Court, in the alternative, for:

(a) An order permitting appellant to file in this Court, with leave to all parties without printing to refer thereto on brief and argument on this appeal, a transcript of the official stenographic report of the proceedings had November 24 and November 26, 1943, in the District Court of the United States for the District of New Jersey, before a statutory court consisting of the Honorable Gerald McLaughlin, Circuit Judge, and the Honorable Guy L. Fake and the Honorable Thomas F. Meaney, District Judges, upon the application of the appellees herein for an interlocutory injunction against certain orders of

the Interstate Commerce Commission, which interlocutory injunction was granted by said court on November 26, 1943; or

(b) A writ of certiorari to said District Court requiring said court to certify and transmit to this Court, as part of the record on the above appeal, a true and complete transcript of such official stenographic report.

Said District Court has refused to allow such transcript of the proceedings before the statutory court on the application for an interlocutory injunction to be filed of record in said Court and the transcript of such proceedings, therefore, has been omitted from the transcript of record transmitted to this Court by the District Court on the above appeal and filed in this Court on March 7, 1944.

The grounds in support of said motion are stated in the attached affidavit of John F. Finerty, counsel for appellant, which affidavit is made part of this motion.

As relevant to this motion, said affidavit also states grounds showing that this appeal from the order of the statutory court granting an interlocutory injunction is not rendered moot by the subsequent order of that court granting a permanent injunction in the same proceedings.

JOHN F. FINERTY
Counsel for Appellant
Hudson & Manhattan Railroad Company

JOHN E. BUCK,
THOMAS A. HALLERAN,
CRAVATH, SWAINE & MOORE,
Of Counsel.

I hereby certify that on March 20, 1944, I served a true copy of the above motion and of the attached affidavit upon counsel for each of the appellees herein.

JOHN F. FINERTY

IN THE

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Appellant,

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STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN F. FINERTY, being duly sworn, states as follows:

1. That he is counsel for the appellant on the above appeal.

2. That this affidavit is filed in support of the motion in the alternative of the appellant to correct diminution of record.

3. That on November 24, 1943 and November 26, 1943, proceedings were had in the District Court of the United States for the District of New Jersey upon a hear-

ing before a statutory court consisting of the Honorable Gerald McLaughlin, Circuit Judge, and the Honorable Guy L. Fake and the Honorable Thomas F. Meaney, District Judges, on the application of the appellees for an interlocutory injunction against two orders of the Interstate Commerce Commission, of June 8, 1943 and November 2, 1943, respectively, insofar as they authorized appellant to publish and charge certain increased fares for interstate transportation of passengers.

4. That the stenographic report of the proceedings upon such hearings was taken and transcribed by the official reporter of said District Court, Theresa Cross Bergen. Attached to this affidavit, marked "Exhibit A", is the transcript of such stenographic report as originally furnished by such official reporter to the affiant as counsel for appellant.

On subsequent inquiry by affiant of the official reporter affiant was advised that there had been omitted from page 177 of such transcript the following:

> "Judge McLaughlin: Off hand, we seriously question the right of a New Jersey municipality to furnish such bond".

and that this omitted matter immediately followed the statement of Judge McLaughlin shown on page 177, reading as follows:

> "Judge McLaughlin: We will add to the opinion with reference to the necessity of the municipal plaintiff being required to give bond, as we see it, there is no obligation on the part of such branch of Government to furnish a bond in this proceeding."

On further request to the official reporter, affiant was furnished with an additional transcript of the official stenographic report of such proceedings, such additional transcript being entitled by such official reporter

"EXCERPT FROM INFORMAL COLLOQUY RE FIXING OF DATE FOR FINAL HEARING"

Such additional transcript is attached to this affidavit marked "Exhibit B." The official reporter advised affiant that the matter covered by this additional transcript had been omitted from Exhibit A at the direction of Judge McLaughlin.

5. On February 9, 1944, all parties to this appeal from the granting of an interlocutory injunction, as well as all parties to the related appeal, No. 767, from a decree and order granting a permanent injunction, entered into a stipulation for a praecipe for a consolidated transcript of record covering both appeals. In such stipulated praecipe, there was designated for transmission to this Court as part of the record on this appeal said transcript of the stenographic report of the proceedings on the hearings of November 24 and November 26, 1943 before said statutory court.

6. On or about February 24, 1943, affiant, while engaged in cooperating with the Clerk of said District Court in the preparation of such consolidated transcript of record for transmission on such appeals to this Court, learned, for the first time, that no part of said transcript of the stenographic report of the proceedings on said hearings of November 24 and November 26, 1943 upon the application for an interlocutory injunction had been filed of record in said District Court, although there had been filed of record

in said Court a transcript of the stenographic report of the proceedings on the hearing of December 14, 1943 on the application for a permanent injunction. Said latter transcript now forms part of the consolidated transcript of record certified by said District Court to this Court.

7. Thereupon affiant requested Judge McLaughlin, as the Circuit Judge who had presided at said hearings of November 24 and 26, 1943, on the application for an interlocutory injunction, and Judge Meaney, who had convened said statutory court to hear such application, to permit at least that portion of the transcript of the proceedings on said hearings covered by Exhibit A to be filed of record in said Court and to be certified to this Court as part of the consolidated transcript of record on the aforesaid appeals. Both Judge McLaughlin and Judge Meaney refused such permission, stating in substance that they considered the transcript of such proceedings upon the application for an interlocutory injunction irrelevant to this appeal from the order granting said injunction. In view of the attitude of the majority of the Court, affiant made no request in the foregoing respects to the remaining member of the Court, Judge Fake.

8. Affiant believes that such transcript of the stenographic report of the proceedings on the hearings of November 24 and November 26, 1943 before such statutory court on the application by appellees for an interlocutory injunction is a relevant, necessary, and proper part of the record upon this appeal from the order granting such interlocutory injunction, for the following reasons:

A. Three of the basic findings of said statutory court, which appellant has assigned as error upon this appeal,

are either expressly, or by necessary implication, based on matters which appear only in such transcript of the stenographic report of the proceedings before said Court and do not appear in the present transcript of record on this appeal.

Finding No. 5, that appellees were denied a full and fair hearing before the Interstate Commerce Commission is, by its express terms, based on "pleadings and *arguments herein*" (i.e. in such proceedings before said Court).

Finding No. 6 that

> "The national interest requires that the fares of said (appellant) railroad be maintained as currently in effect, which present fares are the same as those in effect on September 15, 1942, pending final hearing of this cause"

was made in the absence of any evidence whatever to such effect appearing in the present transcript of record on appeal before this court and must be based, if at all, upon certain representations and arguments to such effect made by counsel for appellees in the proceedings on the hearings before said Court on the application for such interlocutory injunction, and which appear only in such transcript of the stenographic report of such proceedings.

Finding No. 7, insofar as it finds that irreparable damage will result pending final hearing to the appellee, Director of Economic Stabilization, if an interlocutory injunction should not be granted against said orders of the Interstate Commerce Commission, was likewise made in the absence of any evidence whatever to such effect appearing in the present transcript of record on appeal before this Court, and must likewise be based, if at all, upon certain arguments and representations to this effect made by counsel

for said appellee in the proceedings on the hearings before said Court on the application for an interlocutory injunction, and which appear only in such transcript of the stenographic report of such proceedings.

Affiant believes that such transcript of said stenographic report will demonstrate that such statutory court was unjustified in making such findings, on any basis therein appearing.

B. Said transcript will show that said statutory court not only abused its discretion in issuing such interlocutory injunction but that it acted under a complete misapprehension of the proper function of such an injunction, of the proper limits of its discretion in relation thereto, and of the evidence necessary to sustain an order granting such an interlocutory injunction as distinguished from a permanent injunction.

C. Said transcript will show that said statutory court on the hearing of the application for an interlocutory injunction proceeded on the theory that it was called upon to determine to the same extent as upon final hearing whether, as alleged in the complaint and the intervening petition of the respective appellees, the Commission's orders sought to be enjoined were made without full and fair hearing and contravened the Emergency Price Control Act and the Inflation Control Act; that, accordingly, said Court, instead of merely undertaking to determine whether such complaint and intervening petition made a prima facie showing in these respects, so as not on their face to require dismissal of such application, undertook in its findings Nos. 5 and 6 heretofore referred to to make findings in these re-

spects as if upon final hearing; that said Court ignored the fact that the real issues before it upon the application for an interlocutory injunction were whether if such orders were not enjoined pending final hearing irreparable damage would result to appellees or whether, if they were enjoined, no damage would result to appellees but irreparable damage would result to appellant; that thereupon the Court, in the absence of any evidence whatever that irreparable damage would result to the appellees pending final hearing, and based either upon mere representations and arguments of counsel for appellees that such irreparable damage would result, or on the assumption that such damage followed as a matter of law from its findings Nos. 5 and 6, made its finding No. 7 that irreparable damage would result to appellees if an interlocutory injunction were not granted; (in this connection, the attention of this Court is respectfully called to the affidavit of Arthur Potterton, Acting Mayor of appellee, City of Jersey City, presented on such application and which is part of the present transcript of record on this appeal, which affidavit, however, fails to show that any damage could result to the said appellee pending final hearing by the denial of an interlocutory injunction, as distinguished from damage which might result by the granting of a final injunction); that said Court, therefore, erroneously failed to find that irreparable damage would result to appellant from the granting of an interlocutory injunction, although conclusive proof that such irreparable damage would result was contained in the affidavit of Walter F. Brown, Chairman of the Board of Directors and President of the appellant railroad, which is part of the present transcript of record on this appeal.

D. Said transcript will show that said statutory court, at the hearing of November 24, 1943, on the application for an interlocutory injunction, offered to set said proceedings for final hearing the following week if appellant would comply with the Court's suggestion that appellant voluntarily postpone the effective date of its tariff publishing the increased fares authorized by the Commission's order; that, when appellant refused such voluntary postponement, the Court, in granting an interlocutory injunction, undertook to postpone the final hearing until January 4, 1944, and only consented to advance the final hearing to December 14, 1943 when appellant suggested it would ask the convening of another statutory court in order to obtain an earlier final hearing so as to minimize damage to appellant.

E. Said transcript of record will show that, although appellant specifically directed the Court's attention to Rule 65(c) of the Federal Rules of Civil Procedure, providing that no preliminary injunction shall issue except upon the giving of security by applicant in such sum as the court deems proper for the payment of such costs and damages as may be incurred and suffered by any party who is found to have been wrongfully enjoined or restrained, and that only the United States or an officer or agent thereof are exempted from such requirement, the Court, although stating

> "Off hand, we seriously question the right of a New Jersey municipality to furnish such bond"

nevertheless granted an interlocutory injunction, and held the appellee, City of Jersey City, exempted from the requirements of Rule 65(c).

F. Without such transcript, appellant will be unable to show the full extent to which such statutory court abused its discretion in the foregoing and other respects in the issuance of such interlocutory injunction.

9. Affiant believes it proper in connection with this motion to call the Court's attention to the fact that appellee, City of Jersey City, has filed no objection to the jurisdiction of this Court of this appeal, and that the objection filed in this respect by appellee, Director of Economic Stabilization, makes no claim that this appeal has become moot by reason of the subsequent granting of a final injunction in the same proceedings. Affiant nevertheless believes it appropriate in connection with this motion respectfully to call the Court's attention to the following grounds upon which the affiant believes it demonstrated that this appeal has not become moot.

A. Affiant respectfully submits that, should it be determined that such interlocutory injunction was wrongfully granted, appellant should be entitled to damages against appellee, City of Jersey City, by reason of such appellee's reckless, if not malicious, prosecution before said statutory court of its application for such interlocutory injunction under the following circumstances:

(1) Such appellee's knowledge that it could not be damaged pending final hearing, should no interlocutory injunction be granted.

(2) Such appellee's knowledge that appellant would be irreparably damaged in excess of $1,000 per day by the granting of such interlocutory injunction pending final hearing.

(3) Such appellee's knowledge that it was without power to give the security required by Rule 65(c) of the Federal Rules of Civil Procedure to protect appellant from damages which would follow the wrongful granting of such interlocutory injunction, and such appellee's knowledge of the expression by the statutory court of its serious question of such appellee's power to give such security.

(4) Such appellee's knowledge that, unless it had power to give the security required by Rule 65(c), it was not entitled to an interlocutory injunction.

B. Affiant respectfully submits that, irrespective of appellant's right to damages against appellee, City of Jersey City, this Court should determine whether such interlocutory injunction was wrongfully granted for the following reasons:

(1) To determine the important question whether it is an abuse of discretion by a statutory court to grant an interlocutory injunction in the absence of evidence of substantial or irreparable damage to the applicant, if such injunction be denied, and in the face of evidence of irreparable damage to a defendant should such injunction be granted.

(2) To determine the important question whether a municipal applicant for an interlocutory injunction is exempt from Rule 65(c) of the Federal Rules of Civil Procedure.

Affiant respectfully submits that the failure of this Court to determine these questions might well be construed

by other statutory courts as an approval, if not a specific affirmance, of the action of the statutory court here involved with respect to such questions.

JOHN F. FINERTY.

Subscribed and sworn to before me
March 20, 1943.

.....
Notary Public